REPORT
on the Free Movement of Workers in the Netherlands in 2002-2003

Rapporteur: prof. dr. Kees Groenendijk
(with the collaboration of dr. Paul Minderhoud)

November 2004

Centre for Migration Law
Faculty of Law
Radboud University Nijmegen
The Netherlands

General Remarks

1. The case law of the Court of Justice on the residence rights of Union citizens, especially in its *Baumbast* judgment has cast serious doubts on many traditional ways of dealing with EU citizens free movements rights by Dutch immigration officials. The judgment resulted in a long circular from the Ministry of Justice TBV 2004/1 (see chapter I). That circular implicitly contains the message that for many practical purposes EU citizens are no longer to be treated as "aliens".

2. In 2003 a debate started both before the courts and in the legal literature on the question to what extent a Dutch administrative court has the competence under Dutch law or the obligation under EC law to consider *proprio motu* whether an EU citizen has residence rights under Community law, even if the EU citizen himself does explicitly claim such rights. The Judicial Division of the State Council appeared to have given a negative answer (no competence under Dutch law) early in 2003, but in July 2003 to have accepted such an obligation for a national court under Community law. However, in a recent judgment on the detention of an EU citizen, the Division repeated its first position (see Chapter I and Judicial Division 2 March 2004, *Jurisprudentie Vreemdelingenrecht* 2004, no. 176). This position is hardly compatible with the task of the national courts as outlined by the Court of Justice in its judgments in *Baumbast* and *Orfanopoulos*.

3. The implementation of EC free movement law under the Aliens Act 2000 is partial, complex, poorly organized and to a large extent realized only in instructions to immigration officials rather than in binding law. The rights of union citizens are only partly explicitly implemented in binding legislation (mainly in provisions of the Aliens Decree 2000). As to the categories of union citizens entitled to move and reside under Community law, the Aliens Decree simply refers to seven EC Regulations or Directives (Article 8.10 Aliens Decree). Which persons actually are covered by those rules is described in the Aliens Circular. According to the Explanatory Memorandum to the Aliens Decree this way of implementing the EC free movement rules is "for the time being" (p. 497). This appears to indicate that the prevail method of implementation since 1986 will continue for the time being. Secondly, the description of the rights of union citizens in the Aliens Circular is incomplete and not always correct. Moreover, the new residence document issued to union citizens under the new legislation does not mention that this document is an EEC residence card as required under Article 4(2) of 68/360/EEC. The implementation of the recently adopted Directive on the free movement of Union citizens and their family members would present an excellent opportunity for the Dutch authorities to rethink both the question whether the residence status of those persons should be regulated in the Aliens Act or elsewhere, and to draft one clear set of rules implementing the new Directive.

4. The access of nationals of the new Member States to employment in 2003 has been the subject of extensive public and political debate resulting in a full turn of the Dutch government. In 2000 and 2001 the original fear for large numbers of workers from those countries gradually gave way to the idea that workers of those countries should get

preferential access to employment if there were no applicants for a vacancy within the EEA and to a public statement of the Dutch Prime-Minister that the Netherlands would not use its power under the Accession Treaty to limit the access of workers from the new Member States during the transitional period after accession. However, in 2003 and 2004 the new government mounting political pressure related to a general anti-immigration climate (see chapter VII).

5. Exclusion or inclusion of EU citizens in the integration "measures". The question to what extent and on what grounds EU/EEA citizens can be excluded from public benefits specially meant for migrants from third countries, e.g. remigration benefits or language and integration courses, has been raised in our previous reports. The scope of the issue has expanded after the accession of the ten new Member States to the Union and with the introduction of the new integration policy that envisages the possibility of obligatory integration course for former EU migrants now having Dutch nationality and for EU migrants that have been born outside the EU (see chapter VIII).

6. From recently published data, it appears that the number of EU nationals of four major Member States, who also have Dutch nationality, living in the Netherlands is almost equal to the number of registered EU-nationals in the Netherlands who only have the nationality of those four Member States (see Chapter VIII). This implies that the mobility between Member States may be considerably higher than often is thought on the basis of the official population statistics that do not take dual nationality into account. It also implies that many of these EU citizens with dual nationality will have rights under EC law on free movement. This raises serious doubt about the compatibility with EC law of the policy of reverse discrimination, practiced by certain Member States with regards to these dual nationals.

7. In 2002 and 2003 the number of court cases relating to Community law on free movement of persons, as in previous years, remained relatively small compared with the total number of immigration cases decided by the immigration courts. Most of these cases before national courts in the two years covered in this report related to four issues:

(1) the scope of the public order exception in case of detention, deportation or refusal of entry of an EU citizen,
(2) the admission of third country family members of EU citizens,
(3) whether under the Europe Agreements nationals of those countries, intending to work as a self-employed person, can be obliged to obtain a long term residence visa before entry in the Netherlands, and
(4) the application of the provisions on residence rights under the EEC-Turkey Association Treaty.

8. In this report we will observe several instances where activities of the European Commission, supervising the implementation of Community rules on free movement in the Netherlands, have resulted in changes in the national legislation, in speeding up of the process of implementation of new Directives or in the accurate implementation of old Directives. Examples mentioned in this report are the extensive circular TBV 2004/1

on the acquisition and loss of residence right by EU citizens (see chapter I), the implementation of the Directive on Advocates (see chapter X), the equal treatment in issuing the national mortgage guarantee, the possibility to use a driving license issued by another Member State as an official identification document (both in chapter II), and the removal of the residence requirement in the legislation on study grants (see chapter X).

Chapter I
Entry, Residence, Departure and Remedies

A. Entry

a) Texts in force

As the combined result of the judgment of the Court of Justice in *Baumbast*, a judgment of the Judicial Division of the State Council of 7 July 2003 drawing some consequences from the *Baumbast* judgment for the Netherlands and the formal infringement notice of the Commission of 3 April 2003, stating that the Netherlands did not comply with its obligations under EC law on free movement of persons on four issues, all together produced an important change in the rules on EU citizens, announced early in 2004. Typically, the change was formulated in an extensive instruction to local and regional police authorities, rather than in binding legal rules. The relevant circular (TBV 2004/1, see Annex 1) is entitled Citizenship of the Union.

The circular states that two provisions in the Aliens Decree (Article 8.5(1)(b) and Article 8.7(1)(c) of Royal Decree 23 November 2000, *Staatsblad* 497) that allow for the refusal of EU citizens at the border for lack of sufficient means, will no longer be applied, because they are not compatible with the EC Directives on free movement of persons. According to the circular, the two provisions were not applied in practice. A citizen of the Union may no longer be refused at the border on the ground that he may become a burden on the public purse. The relevant provisions have not yet been deleted from the Royal Decree.

More important is that the circular repeatedly states that an EU citizen, because of the direct effect of the Articles 17 and 18 EC Treaty has to be treated as a "community citizen" (*gemeenschapsonderdaan*) as defined in Article 1 of the Aliens Act 2000, until the Minister of Aliens Affairs and Integration has decided, on the basis of an inquiry, that the person does not have residence rights under Community law. Hence, EU citizens have to be treated as having residence rights until the opposite has been established by the central authorities and a written decision to that end has been made. The typical Dutch legal concept of "community citizen", that in practice over decades implied that large numbers of EU citizens did not have residence rights under EC law, will as a result of this redefinition, gradually loose much of its practical meaning.

In the general chapters of the Aliens Circular several amendments are made to stress that EU/EEA and Swiss citizens cannot be required at the border to provide information on the length and purpose of their stay in the Netherlands or on their means. At the border formalities with regards to these persons should be limited to the showing of a valid passport or ID-card (amendments in A2/2.2.1 and A2/4.4 Aliens Circular). Similar changes has been inserted in the special chapter on EU/EEA citizens (B10) of the Aliens Circular.

Remarkably, these important changes in the implementation of the EC rules on free movement have not been enacted in binding national legislation, as required by case-law of the Court of Justice. No corresponding amendment of the immigration legislation has been announced.

Earlier in 2003 in a circular amending the Aliens Circular it was specified that "community citizens" could only be registered in the national register of wanted persons (Op-

sporingsregister, OPS), not in the Schengen Information System, in case they present an actual threat to public order (TBV 2003/9, p. 3 amending A3/4.2.3 of the Aliens Circular, see Annex 2).

In May 2003 a special instruction to frontier police was issued in relation with the SARS virus (TBV 2003/13 of 9 May 2003, *Staatscourant* 2003, nr. 99, Annex 3). This circular raised the question whether refusal of EU citizens on the ground of infection with SARS would be allowed, since SARS is not on the list of illnesses mentioned in Article 4(1) of Directive 64/221 and the Articles 2, 5 and 6 of the Schengen Implementing Agreement do not mention refusal at the border on grounds of public health, see the publication by Woltjer, mentioned below.

The text of the Aliens Act 2000 with amendments up to September 2003 has been published in Staatsblad 2003, 370 (see Annex 4).

b) Draft legislation

c) Judicial practice

A Greek citizen who with his Dutch wife and their two small children returned on a direct flight from Greece at Amsterdam Airport, complained about being asked by a frontier guard for his Dutch residence permit, for being separated from his wife, for his passport being copied without any explanation and for being refused to contact the Greek embassy in the Netherlands. The National Ombudsman held that this behaviour of the frontier police was improper because it violated Article 3 of Directive 68/360/EEC and Article 2 of the Schengen Implementing Agreement, since the flight was an intra-Schengen flight. The questioning at the border resulted in an emotional and noisy incident. The Ombudsman could not establish whether a request to contact the Greek embassy had been made, but held that the passport could not have been copied without asking permission and explanation of the purpose of making copies, Report 2002/312 of 14 October 2002.

d) Miscellaneous

e) Literature

A.P. van der Mei, De juridische waarde van het Burgerschap van de Europese Unie, *Migrantenrecht* 2003, p. 268-275 and p. 319-324.

E. de Smijter, Het Europees recht omtrent het verblijfsrecht in de Europese Unie, *Sociaal Economische Wetgeving (SEW)* 2003, p. 154-168.

H. Staples, Het verblijfsrecht van de Unie en hun familieleden (extensive case note on Baumbast), *Nederlands Tijdschrift voor Europees Recht* 2003, p. 49-54.

A. Woltjer, Over TBV 2003/13, volksgezondheid (SARS) en het legaliteitsvereiste, *Migrantenrecht* 2003, p. 245/246.

B. Residence

a) Texts in force

The circular TBV 2004/1, mentioned above, implements the *Baumbast*, the *Carpenter*, *Grzelczyk* and the *Givane* judgments. It states that an EU citizen who has lost his resi-

dence right as a worker, self-established person or student, still may have a residence right under Directive 90/364/EEC. He has to be treated as a "community citizen" lawfully residing in the Netherlands under Article 8(e) of the Aliens Act 2000 until the Minister of Aliens Affairs and Integration has investigated whether the person has residence rights under any of the Directive or with analogous application of the conditions of Directive 90/364/EEC. The EU citizen has to provided the necessary documents to the extent allowed by Community law (B10/1.7 Aliens Circular). According to the circular, during this investigation the remedies of Article 64/221//EEC are applicable.

In the circular it is explicitly stated that a Dutch national providing services to persons in other Member States may use his freedom under Article 49 without migrating and has be treated as a community citizen with free movement rights, including the right to family reunification, if certain conditions are fulfilled. The circular than specifies the conditions mentioned by the Court in the *Carpenter* and the *BRAX* judgments (B10/3.3.4). The circular also states that a Dutch national who returns to the Netherlands after having used his freedom of movement has to be treated a community citizen with rights under Community law, but only if he continues his economic activities after his return to the Netherlands (B10/1.6). That latter condition was also mentioned in a letter of the Minister of Aliens Affairs and the Minister of Social Affairs of 22 May 2003 to the Second Chamber of Parliament (TK 21501-31, no. 18, see Annex 5). The condition has been accepted as "reasonable" in a judgment of The Hague District Court (see chapter IV), with the result that reunification with a family member who had joined the Dutch worker elsewhere in the EU was refused.

Explicit mention is made of the residence rights of minor children under Article 12 of Regulation 1812/68 as interpreted in the *Baumbast* judgment (B10/3.6 and B10/5.4.2.1).

EU nationals and their family members are no longer required to sign a declaration that they have no criminal convictions and are not the subject of a criminal prosecution when applying for an EC residence card. In case the official dealing with the application has indications that the applicant has "criminal or unfavorable political antecedents" he has to ask the Minister for Aliens Affairs for a specific instruction. The Minister will then ask the relevant services of the Member State of origin for information. In case of earlier residence in the Netherlands information may be gathered from the regional police in the former residence (final paragraph of B10/7.2.1 as amended by TBV 2004/1).

In the circular TBV 2004/1 it is also recognized that filing an application for public assistance does not automatically end the residence right of an EU citizens under Community law. It may be ground for withdrawal of the residence right, but only after all the interests concerned are taken into account and with respect for the proportionality principle. At this point the circular introduces a "gliding scale": withdrawal of the residence right on the ground of reliance on public assistance during the first year, generally, can be considered as proportionate. During the second year reliance for 50% or more on public assistance for more than three months will be a ground for ending the residence right. In the third year more than six months reliance on public assistance and in the fourth year more than nine months of public assistance will be a ground for ending the residence right. After repeated reliance on assistance during one year or receiving (partial) public assistance for a total of 18 months within a period of three years, the EU

citizen will be considered as "an unreasonable burden" on the public funds. However, in each case before the decision is made, personal (medical) situation, the ties with the country of origin and the reason for reliance on public assistance have to be taken into account (B10/4.3.2).

The documents to be issued to persons with residence rights under EC law are specified in Article 3.2 Aliens Regulation and in the models annexed to that Regulation. According to Article 3.2(3) of the Regulation three different clauses may be mentioned on these documents: an application for public assistance terminates the residence right, an application for public assistance may have consequences for the residence right, or an application for more than complementary public assistance may have consequences for the residence rights. The cases in which one of those three clauses are to be mentioned on the residence document are specified in a three pages matrix in the Aliens Circular (B10/2.10). In the circular TBV 2004/1 it is stated that the first clause (automatic loss of the residence right) should no longer be used. It should be replaced by the second clause: public assistance may have consequences to the residence right.

The residence documents issued to union citizens under the Aliens Act 2000 do not specify on the document that it is an EEC residence card as required under Article 4(2) of 68/360/EEC (see model in Annex 7e to the Aliens Regulation).

During 2002 and 2003 the fees for residence permits were twice raised considerably (increase of 600% and more). The fees for EC residence card remained on a par with the price of the Dutch national identity card. However, EU citizens with long lawful residence in the Netherlands, who are entitled to a permanent residence permit under the Aliens Act 2000 and prefer that permit rather than applying for an extension each year with the aliens police, have to pay the new high tariff of 890 euros per person of over 12 years (TK 28600 VI, no. 141, p. 5).

b) Draft legislation

c) Judicial practice

An Italian national who has resided for 36 years in the Netherlands and for many years run a bar ends this self employed activity early 2002 and in March 2002 applied for social assistance. His residence card was valid until 15 April 2002. On 31 May 2002 he applies for extension of the card and in October 2002 he finds a part-time employment. Social assistance is granted only until the end of the validity of his residence. The court holds that after 15 April 2002 the residence was no longer lawful. Analogous application of Article 7 of Directive 68/360/EEC to self-employed persons is denied. No residence right under Article 18 EC Treaty as in the *Baumbast* judgment, because the Italian citizen applied for full social assistance in March 2002 and would still need partial assistance after he found part-time employment in October 2002. District Court of Utrecht 6 August 2003, *Migrantenrecht* 2003, no. 66 (for more details see Chapter IX).

d) Miscellaneous

e) Literature

E. Gerritsma, Toepassing van de Richtlijnen economisch niet-actieven, *Migrantenrecht* 2003, p. 206/207.

C.A. Groenendijk, Zijn unieburgers nog wel vreemdelingen? (Are Union citizens aliens any longer?) case note under the Baumbast judgment, *Jurisprudentie Vreemdelingenrecht* 2002, no. 466.
C.A. Groenendijk, Exorbitante verhoging van de leges, Justitie als grootgrutter met oogkleppen, *Migrantenrecht* 2002, p. 90/91.
C.A. Groenendijk and C.A.J.M. Kortmann, Nieuwe verhoging leges voor verblijfsvergunningen, wederom onredelijk, onverstandig en onrechtmatig, *Nederlands Juristenblad* 2003, p. 314-321.
A. Kuijer (ed), *Nederlands Vreemdelingenrecht*, 5th edition, The Hague 2003 (Boom), especially on EC free movement law, par. 4.4, 5.2 and 8.2.
J. de Poorte, Verhoging van de leges voor verblijfsvergunningen: nieuw opgeworpen barriere om in Nederland te komen en te blijven, *Rechtshulp* 2003, no. 5.
A.B. Terlouw, Kroniek van het migratierecht, *Nederlands Juristenblad* 2002, p. 1565 ff.

C. Departure

a) Texts in force

In July 2002 the general rules on expulsion on public order grounds in Article 3.86 Aliens Decree 2000 have been amended. The so-called "gliding scale" has been changed in order to create more room for withdrawal of a residence permit and a ban on re-entry after a conviction for a criminal offence, especially if the alien does not have long lawful residence in the country (Royal Decree of 8 July 2002, *Staatsblad* no. 371). In the explanatory memorandum with the Royal Decree the special protection of EU citizens and Turkish citizens under the Association Agreement is mentioned. However, in the long circular on the change (TBV 2002/34 of 30 July 2002) no mention is made of the fact that withdrawal of a permit and a ban on re-entry with regard to persons having residence rights under EC law, is only possible on the restricted grounds, specified in the *Bouchereau* and *Calfa* judgments of the Court. Since few immigration officers will read the Staatsblad and many will only read the circulars, this increases the possibility that the gliding scale in practice will be applied more or less automatically with regard to EU, EEA and Turkish citizens and their family members.

In the circular TBV 2004/1 of January 2004, mentioned above, it is made clear that lack of sufficient means and a criminal conviction do not automatically end the residence right of a person under EC law. However, the Aliens Decree still provides otherwise. The circular also severely restricts the possibility of detention of EU citizens with a view to deportation. Only after the Minister has investigated whether an EU citizen has a residence right under EC law and after he has made a written decision that the person has not or no longer such a residence right, and unless the Minister has decided that the deportation is urgent, no detention is allowed (B10/5.3.3.7 Aliens Circular as amended by TBV 2004/1). This change is a direct result of two judgments of the Judicial Division of the State Council implementing the *Baumbast* judgment of the Court. It probably will put an end to a series of cases where EU citizens have been taken into detention with a view to deportation, without consideration of their residence rights under EC law. In previous reports we have cited several cases where the courts have lifted the detention order on the grounds that it violated EC law. In 2002 and 2003 between ten and twenty

of such judgment are documented in the data-base of the Aliens Chambers of the District Courts. Hereunder we will only report the judgments of the Judicial Division.

The circular TBV 2004/1 does not solve another practical problem: how should the immigration officials act if a person claims to be a Union citizens but does not carry a passport or ID-card? The circular states that in such cases as a rule it cannot be established that the person has residence rights under EC law and, hence, detention is possible without the restrictions mentioned before. In case the person during his detention produces his passport, he has to be treated as an EU nationals, and, hence, detention is no longer possible before a written decision by the Minister has been issued. These instruction do not explicitly deal with situation where the police or the immigration authorities, for instance from previous contacts, have information on the nationality or the passport number of the person concerned. This issue in May 2003 gave rise to a series of preliminary questions from the District Court of The Hague to the Court of Justice in the case *Oulane* (case C-215/03, OJ 2003 C 171/15).

Finally, the two judgments of the Judicial Division, reported below, also gave raise to the debate to what extent a Dutch court has the competence under Dutch law or the obligation under EC law to consider proprio motu whether an EU citizen has residence rights under Community law, even if the EU citizen himself does explicitly claim such rights. In one of those judgments the Judicial Division appears to have accepted such an obligation for a national court. However, in a recent judgment on the detention of an EU citizen, the Division took the opposite position, judgment of 2 March 2004, *Jurisprudentie Vreemdelingenrecht* 2004, no. 176.

b) Draft legislation

c) Judicial practice

- The Judicial Division of the State Council held that the judgment in Baumbast implied that an EU citizen has the right to reside in another Member State on the basis of Article 18 EC Treaty, even if he does not fulfill all the conditions of Directive 90/364/EEC. It follows from Article 18 that the residence right of an EU citizen has to be supposed until it has been established after an investigation that the union citizens does not have a residence right in case of analogous applications of the conditions of said Directive. As long as such a decision has not been made, the union citizen has lawful residence in the Netherlands according to Article 8(e) of the Aliens Act 2000. Reasonably interpreted that provision also covers persons who have a residence right directly based on a provision of the EC Treaty. The union citizen could only have been detained with a view to deportation after the Minister on the basis of an investigation had established that he did not have a Community residence right and that there was an urgent reason for the immediate deportation of the person, as provided in Article 7 of Directive 64/221/EEC (judgment of 7 July 2003, *Jurisprudentie Vreemdelingenrecht* 2003, no. 431 with annotation by C.A. Groenendijk, see Annex 6).

- The same Court at the same date arrived at a similar decision with regard to the imposition of a re-entry ban (ongewenstverklaring) of a union citizen (judgment of 7 July 2003, *Administratiefrechtelijke Beslissingen* 2003, no. 338).

- A person claiming to be a Greek national is detained with a view to expulsion. The Dutch police states that the passport is false. In appeal its is held that the fact that the

Greek Consulate later certified the authenticity of the passport does not make the detention unlawful from the beginning (Judicial Division of the State Council 6 February 2003, *Jurisprudentie Vreemdelingenrech*t 2003, no. 113 with annotation by P. Boeles). In a similar case of a Portuguese citizen, where the Dutch police claimed the passport to be false and the Portuguese Consulate confirmed that is was authentic, the Assen Aliens Chamber the District Court The Hague held that the detention was unlawful from the beginning and awarded 2.200 euros damages, judgment of 30 January 2003, *Jurisprudentiebulletin* 2003, no. 4, p. 39-41. In an earlier judgment the Judicial Division gave less protection to a detained EU citizen, 13 January 2003, *Jurisprudentie Vreemdelingenrecht* 2003, no. 82 with annotation by P. Boeles.

- A decision that the residence right of an EU citizen has to terminated on public order grounds can not be based solely the type, gravity and the identity of the criminal offenses committed. The Minister has to take into consideration whether at the time of his decision the continued residence of the union citizen presents an actual danger for the public order. This includes a review of the behavior of the person after his criminal conviction and his present social situation (Amsterdam Aliens Chamber of the District Court of The Hague 15 May 2003, *Jurisprudentiebulletin* 2003, no. 11, p. 4 and Migrantenrecht 2003, no. 36).

d) Miscellaneous

On 29 November 2003 a demonstration took place in the city of Nijmegen in relation with the 11th International Non-Shopping Day, a form of protest against consumerism and the large discrepancies in richness between the Western countries and developing countries. Some fifteen participants in the demonstration were arrested by the police. Eleven Dutch nationals were served with a police notice containing a ban to be in the city centre for twelve weeks. Two Scottish participants were detained with a view to deportation. The Aliens Chambers in Assen and in Arnhem held the detention to be unlawful and awarded damages to the detained EU citizens (*De Brug* 24 December 2003, p. 1).

e) Literature

P. Baudoin a.o., *Vrijheidsontneming van vreemdelingen*, The Hague, Boom 2002.

S.H.J.M Roelofs, De maatregel tot ongewenstverklaring, Nationaal- en internationaalrechtelijk perspectief, *Migrantenrecht* 2002, p. 248-255 and p. 284-286.

H. Staples, Het arrest Oteiza Olazabal: mag het ook iets minder zijn?, *Nederlands Tijdschrift voor Europees Recht* 2003, p. 90-92.

D. Remedies

a) Texts in force

Under the Aliens Act 2000 the possibility of the Minister of Justice to seek the advice of the Standing Committee of Advice in Aliens Matters (*Adviescommissie voor Vreemdelingenzaken*) in case of a request for administrative review of a negative decision in immigration cases has been restricted to cases where such advice is obligatory under international law (Article 2(4)(b) of the Act). In Article 1.5 Aliens Decree 2000 it is

specified that the Minister has to seek the advice of the Standing Committee in case of review of a decision to refuse entry, a decision stating the person has no (longer) a residence right under EC law or that this right is terminated on the ground of a danger for public order or public health as mentioned in Directive 64/221. An amendment of the Aliens Act that entered into force in 2003 retroactively stipulated that as of 1 April 2001 administrative review can in all old cases, where independent review is not compulsory under international obligations, be heard by a committee of civil servants (Act of 6 November 2003, *Staatsblad* no. 450). The practical effect of this amendment is that only in administrative review cases concerning the residence right of EU citizens will the independent Standing Committee hold a hearing for the appellant and advice the Minister. In the Explanatory Memorandum the Minister estimated that this would apply to a few dozens of cases annually, mostly cases where further residence or entry is refused on public order grounds (TK 28267, no. 3, p. 2).

As a result of the case-law of the Judicial Division of the State Council and the circular TBV 2004/1, the number of cases of detention with a view to deportation of EU citizens might diminish, because immigration and police authorities may consider that organizing a deportation of an EU citizens will require too much time and effort. This development will reduce the number of habeas corpus appeals to the courts against the detention. In theory, another development might occur: since only after the Standing Committee has given its advice and the Minister has taken a negative decision on the administrative review, an EU citizen can be actually expelled (except for cases considered "urgent"), the number of written decisions and review proceedings might increase. The announced Bill that will reduce the judicial control of this detention (requiring obligatory control by the courts only after 30 days rather than seven days), may further reduce the use of remedies in cases of detained EU citizens.

b) Draft legislation

c) Judicial practice

d) Literature

Chapter II
Equality of Treatment

a) Texts in force

The statutory rules on the nationality of captains on Dutch ships have been liberalized in 2002. The relevant bill was introduced in June 2002 and the Act entered into force in 2003 (Act of 22 May 2003, *Staatsblad* 2003, 259, see Annex 7). This act among others amended article 30 of the Zeevaartbemanningswet (Staatsblad 1997, 757, as amended by the Act of 5 April 2001, *Staatsblad* 2001, 180). According to the amended text of article 30(1), citizens of one of the Member States of the EEA are exempted from the rule that requires captains of Dutch ships to have Dutch nationality. However, this exemption does not apply to captains of fishing vessels. The explanatory memorandum on this bill explicitly referred to the case-law of the Court of Justice on the public service exception in article 39(4) of the EC Treaty. The government stated that its decision not to rely on that exception any longer with regard to captains of ships would further the principle of free movement of workers between the Member States. Unknowingly, the government anticipated on the judgment of the Court of 30 September 2003 in the *COMMA-ANAVE* case (C-405/01)

b) Draft legislation

The possible effects of the proposed legislation on integration measures, requiring a language and integration test of all residents over 18 years of age born outside the EU, for the (un)equal treatment of EU migrants are discussed in chapter VI.

The Bill on the ratification of the 12th Protocol to the European Convention on Human Rights, containing a general anti-discrimination provision, has been introduced in Parliament in 2002 (TK 28100). The bill has been approved by the Second Chamber in 2003 and was pending before the First Chamber at the end of that year.

The Bill amending the General Equal Treatment Act (*Algemene wet gelijke behandeling*) in order to implement the Directive 2000/43/EC and the Directive 2000/ 78/EC was introduced in Parliament in 2003. The Act on the implementation of those two directives (Act of 21 February 2004, *Staatsblad* 2004, 116) entered into force on 1 April 2004.

The intention of the government to extend to obligation of individual persons to carry and present an ID-card or other document materialized in a bill that was introduced in Parliament in 2003 (TK 29218, see Annex 8). The bill was approved by the Second Chamber in 2003 and was pending before the First Chamber at the end of that year. According to the bill two new provisions will be added to article 1(1) of the 1993 Act on the identification obligation (*Wet op de identificatieplicht*), allowing EU/EEA nationals to use their national passport or a drivers license issued by a Member State for identification purposes, when required to do so by law. The addition of drivers licenses issued by other Member States was explicitly referred to as the result of an action of the European Commission, asking the Dutch authorities to end differences in treatment between Dutch and other EU nationals. This extension is limited to drivers licenses of EEA nationals resident in the Netherlands and to licenses carrying a photograph. The latter requirement excludes certain British drivers licenses (TK 29218, no. 3, p. 19). The bill also grants the government the power to make implementing rules that will allow

EEA citizens residing in the Netherlands for more than six months to use Dutch ID-cards for official identification purposes.
The bill does not change the relevant provision on identification of aliens in Article 50 of the Aliens Act 2000 and the new rules will apply to all persons in the Netherlands irrespective of their nationality. However, one of the effects of the new rules might be that the police will more often than before stop persons in public places who do not look "Dutch" in order to check their identity and residence rights, irrespective of whether they are Union citizens or not.

In September 2003 the Bill on the withdrawal of the Remigration Act (*Remigratiewet)* Act of 22 April 1999, *Staatsblad* 1999, no. 232 was introduced into parliament. The governments' intention is to end the possibility to file new applications for remigration benefits. In 2002 only a limited number of EU citizens returned with such remigration benefits: 6 Greek, 13 Italian, 9 Portuguese and 61 Spanish citizens (*LIZE Bulletin* no. 42, November 2003, p. 7). A larger number of re-migrants, who returned in earlier years, will continue to receive monthly payments on the basis of the Remigration Act. After experts had estimated that the withdrawal of the act would cost the government about 40 million euros, because of the increased reliance by retired workers on Dutch health and social security facilities, the bill met with considerable opposition in Parliament.

The question to what extend fiscal rules restrict the freedom of movement between Member States was discussed in Parliament both at the occasion of the ratification of the Belgian-Dutch Fiscal Treaty (TK 28259, no. 10, p. 13 and no. 11 on cross border workers) and in relation with amending the Income Tax Act (TK 29210, no. 22, p. 90).

c) Judicial practice
In its opinion on the complaint of a British citizen who was refused membership of a sailing club operating the only yacht-basin in the municipality where he was living, on the ground of not having Dutch nationality, the Equal Treatment Commission held that the General Equal Treatment Act does not apply to the internal arrangements of private associations. In the opinion no reference was made to the applicability of the non-discrimination clauses in article 12 EC Treaty and article 7 of Regulation 1612/68. The sailing club argued that the nationality restriction was justified because it wanted to retain the local character of the club (Commissie Gelijke Behandeling 5 September 2002, *Rechtspraak Vreemdelingenrecht* 2002, 99).

d) Miscellaneous
In the summer of 2003 as part of the agreement of the formation of the present Dutch government it was decided to end the support from public funds for mother tongue education in primary schools (*LIZE Bulletin* no. 41, July 2003, p. 2 and *NRC* 23 August 2003). Education in the languages of the main countries of origin of immigrant workers has been supported by government grants since 1967 (see L. Lucassen and A.J.F. Kobben, *Het partiële gelijk*, Amsterdam 1992). The government intends to present a bill that will delete the relevant provisions from the legislation on primary education. The already small number of children of migrant workers from other Member States, receiving mother tongue education diminished rapidly. In 2002, approximately 2,900 children

from families originating from Southern Member States or the former Yugoslavia were receiving this education (*LIZE Bulletin* no. 39, December 2002, p. 3).

After complaints of a German citizen who was married to a Dutch national and was living with her spouse in the Netherlands, who was refused a mortgage guarantee on the ground that she did not posses a permanent residence permit and questions by an MEP on the same issue (OJ 2002 C 309E/167), this difference in treatment between Dutch nationals and the citizens of other Member States was deleted from the rules of the National Mortgage Guarantee.

The exclusion of EU/EER citizens from the (obligatory) language and integration courses under the 1998 Act on the incorporation of new immigrants (*Wet inburgering nieuwkomers*), described in our previous reports, continued in 2002 and 2003.

Davies has given a concise survey on the cause for unequal treatment of EU migrants and the relevant case-law of the Court of Justice (see below).

e) Literature

G. Davies, Bureaucracy and Free Movement, A Conflict of Form and Substance, *Nederlands Tijdschrift voor Europees Recht* 2003, p. 81-89.

H. Staples, Heeft omgekeerde discriminatie zijn langste tijd gehad?, *Nederlands Tijdschrift voor Europees Recht* 2002, p. 205-209.

C.J. Smits-Kam, Gelijke behandeling van tijdelijke en vast werknemers, *PS Documenta* no. 10/11, 2002, p. 1076-1090.

Chapter III
Employment in the Public Sector

a) Texts in force

As described in earlier reports on the Netherlands, the general nationality requirement for appointment as a civil servant with the Dutch government has been removed in the 1980's. There has never been a general nationality requirement for access to public posts with provincial or municipal authorities. Most of the specific nationality requirements in separate Acts have been deleted in the early 1990's (e.g. Act of 1991, *Staatsblad* 1991, 98).

The nationality requirement still is in force for functions with the courts, the police, the military and the diplomatic service, for a few high state offices such as the National Ombudsman, the heads of the provincial administration (*Commissaris van de Koningin*, see Article 63 Provincial Act), for the *burgemeester*, the head of the municipal authorities (Article 63 Municipal Act), and for public services jobs designated as "security functions" under the Act on Security Functions of 26 October 1996, *Staatsblad* 1996, 525, that entered into force in February 1997.

Moreover, in 1994 the General Equal Treatment Act (*Algemene wet gelijke behandeling* of 2 March 1994, *Staatsblad* 1994, 230) entered into force. Article 1 of this Act prohibits any difference in treatment on the ground of nationality, among others in all employment relations, including the civil service (Article 5), unless such treatment is allowed explicitly by a statutory provisions. Such statutory provisions only exist with regard to the functions mentioned above.

In the latest version of the Regulation on the Foreign Service (Reglement Buitenlandse Dienst, *Staatsblad* 2002, 334) it is explicitly stated in article 17(4) that persons not having Dutch nationality, may only be appointed on temporary or a permanent post in the service, if he has lawful residence in the Netherlands as defined in article 8 of the Aliens Act 2000 and has a residence permit that does not exclude employment in the Netherlands. This implicitly means that a citizen of another Member State who has migrated to the Netherlands is not barred from employment in the Dutch Foreign Service on the sole ground of his nationality.

The liberalization, resulting from the new exemption in the legislation on sailors, allowing for the appointment of EEA nationals as captain on a Dutch ship, not being a fishing vessel, has been mentioned in Chapter II above.

b) Draft legislation

c) Judicial practice

d) Miscellaneous

In its discussion and introduction in the Dutch Parliament of the Commission's Communication on Free movement of workers of 11 december 2002 COM(2002) 694 final, the Dutch government announced that possibly some local rules on the admission in the public service with local or regional authorities may be not in conformity with the case-law of the Court of Justice. Hence, the government announced that it would send a circular to the local authorities in order to draw their attention to the Communication of

the Commission and to the detailed conclusion on this issue adopted by the Ministers of Interior at their meeting in Strasbourg in 2000 (TK 22112, no. 261, p. 9). No such circular had been published in the Official Gazette (*Staatscourant*) by the end of 2003).

Since in the Netherlands the access to a post in the public sector is not regulated by a competition system, like the French *concours*, the *Burbaud* judgment of the Court has produced no visible effects in the Netherlands so far.

Chapter IV
Family Members

a) Texts in force

In September 2003 an amendment of the Aliens Act entered into force that extends the definition of "community citizen" in article 1 of the Aliens Act 2000 in order to include the family members of Swiss nationals having residence rights under the 1999 Agreement on free movement of persons between Switzerland and the EC (Article IA of the Act of 19 June 2003, *Staatsblad* 269, entered into force by Royal Decree of 25 August 2003, *Staatsblad* 335, see Annex 9). At first these family members were forgotten when the 1999 agreement was implemented in the immigration legislation. This mistake was also corrected in the Aliens Circular by the instruction TBV 2003/18 of 20 June 2003 (Annex 10) and TBV 2003/40 of 29 September 2003 (Annex 11), specifying the numerous amendments in several chapters, especially, in B10 of the Aliens Circular.

In the circular TBV 2004/01, mentioned in chapter I, an amendment is made in the chapter of the Aliens Circular dealing with EU citizens, specifying that family members also includes not only spouses but also persons who have entered in a registered partnership in the Netherlands or another Member State with an EU/EEA or Swiss citizen (B2/1.1.5 and B10/4.2.1.1). The circular states that immigration officers may no longer require the spouse or partner to proves that (s)he has sufficient means. A residence permit for economically in-active persons on the basis of Directive 90/364/EEC may be issued on the basis of the income of the other spouse or partner only. The same rule applies to the non-economically active EU spouse of a Dutch national.

According to a change of the Aliens Circular in October 2002 a third country national family member of a EU citizens can only be issued with a residence document after the EU citizen has been issued with his or her residence document, because the notification with regard to access to the labour market and the consequences of reliance on public assistance has to be identical on both documents, see B10/5.2.2 Aliens Circular.

The special status of family members of EU/EEA citizens, who are third country nationals, sometimes is forgotten when making new immigration rules. For instance, in the instructions on controls at the borders it is stated as an exception to the general rule that at entry or departure there has to be a thorough inspection of each alien, such a thorough inspection with regard to EU/EEA and Swiss citizens has to be performed only if there are indications that the person concerned may present a danger to the public order or national security. However, no reference is made to the special position of the third country national family members of EU/EEA and Swiss citizens, see A2/3.3.1 of the Aliens Circular.

The interpretation of the Court, in its judgment in *Givane*, on the continued residence right of family members after the worker has died, is also "codified" in the Aliens Circular (B10/5.4.3) by the circular TBV 2004/1.

Most of the debate on family members before the courts and in the legal literature in 2002 and 2003 related to two issues: the admission of third country family members (long term visa, legalization and verification of documents, etc.) and reverse discrimination of Dutch nationals. In December 2002 the Minister of Aliens Affairs and Integration in a special letter on this issue to Parliament repeated the (incorrect) statement of

her predecessors that the Court of Justice (in *Morson and Jhanjan*) decided that Member States may treat their own citizens who have not yet used their right of free movement less favorable than citizens of other Member States who have used that right (TK 19637, no. 700). The question which third country national family members of EU migrants are exempted from the long term residence visa (mvv) has far reaching implication, since during the years under consideration, a decision on an application for such visa might take up to six months. The issue of legalization and verification of documents of third country national family members before admission has been dealt with extensively by P. Boeles in chapter 8 of his book referred to below. In 2003 the official Advisory Committee on Aliens Affairs published an advice to the Minister on the possibilities of using DNA-tests in case documents on family relations are absent or do not meet the requirements of the Dutch government, see below under d.

b) Draft legislation

c) Judicial practice

- A Dutch national of Turkish origin who worked for five years in France and lived for one year in France together with his son who has Turkish nationality and then returned to the Netherlands. The son was refused a long term residence visa (mvv) on the ground that his father after his return to the Netherlands had been receiving public assistance and had not been employed again. According to the Aliens Circular family reunion with a returning Dutch national who has used this freedom of movement within the EU is only allowed under EC law if the returning national resides in his own country in conformity with the EC Treaty (B10/5.3.2.1, see Chapter I under *B*). The court considered this rule not to be unreasonable and held that the condition had not been met considering the reliance of the father on public assistance (Arnhem Aliens Chamber of the District Court of The Hague 14 April 2003, no. AWB 02/23616, not published).

- A Dutch national who worked and lived for two years in Spain with his spouse and children having Indian nationality, returned to the Netherlands. Admission of the family members as privileged under EC free movement law was refused because the documents establishing the family relationship had to be legalized and verified. The court, citing case-law of the ECJ in *Jhanjan*, *Singh* and *Carpenter*, held that since the documents had been legalized and accepted by the Spanish authorities and the family members had been treated as privileged under Community law, the Dutch authorities could not require another legalization and verification of those documents, Haarlem Aliens Chamber of The Hague District Court 4 December 2002, *Jurisprudentie Vreemdelingenrecht* 2003, no. 148, with annotation by C.A. Groenendijk).

- A Dutch national desiring reunification with his third country national spouse, who was refused a long term residence visa, contended that the exemption of that visa requirement for EU migrants in art. 16a of the former Aliens Act should also be applied to him. The court held that in *Jhanjan* the ECJ had decided that reverse discrimination of nationals who have not used their freedom of movement within the EU is not contrary to EC law. However, the ECJ has not answered the question whether other (international) norms may forbid this reverse discrimination in the national rules on family reunification (Roermond Chamber of The Hague District Court 26 June 2002, *Migrantenrecht* 2002, 57).

- An Italian worker in the Netherlands applies for reunification with the unmarried Italian partner of his Columbian mother. The application is refused on the ground that the partner needs a long term residence visa. The court refers to the *Reed* judgment and considers that since that judgment is over 15 years old, it could be necessary to make a preliminary reference to the ECJ in order to see whether the Court still holds the view that "spouse" in Article 10 of Regulation 1612/68 does not cover unmarried partners. However, in this case a reference is not necessary, since in *Reed* the right of admission of the partner is based on the obligation to avoid unequal treatment of Dutch nationals and EU migrants. Because under Dutch law the third country partners of Dutch nationals are required to have a long term residence visa before their application for a residence permit for family reunification is handled, there is no unequal treatment when the same requirement is applied to the third country partners of EU migrants, Aliens Chamber of The Hague District Court 25 July 2002, *Jurisprudentie Bulletin* 2002, no. 19, p. 16 (no. 541).

d) Literature

Adviescomissie voor Vreemdelingenzaken, *Advies over het gebruik van buitenlandse documenten en DNA-onderzoek bij de toelating van vreemdelingen tot Nederland,met name in het kader van gezinshereniging en gezinsvorming*, Den Haag 2003.

P. Boeles, *Mensen & papieren, Legalisatie en verificatie van buitenlandse documenten in 'probleemlanden'*, Utrecht 2003 (FORUM).

E. Gerritsma, Over het EU-burgerschap in verband met het recht op verblijf binnen de Europese Unie, *Migrantenrecht* 2003, p. 174-175.

R.H. van Ooik and H. Staples, Het recht op gezinsvorming en gezinshereniging volgens het Europese Hof van Justitie, *Nederlands Tijdschrift voor Europees Recht* 2002, p. 269-276.

Sewandono, Annotation of ECJ 11 July 2002 (Carpenter), *Administratiefrechtelijke Beslissingen* 2003, 11.

H. Staples, Heeft omgekeerde discriminatie zijn langste tijd gehad?, *Nederlands Tijdschrift voor Europees Recht* 2002, p. 205-209.

Chapter V
Influence of Recent Judgments of the Court of Justice

The judgment of the Court in *Baumbast* and the resulting case-law of the Judicial Division of the State Council of 7 July 2003, at the beginning of 2004 has resulted in a major change in the rules on the residence rights of EU/EEA citizens, as implemented in the Aliens Circular, as explained in detail in chapter I. The same circular also aims at implementation of the Court's case-law in *Carpenter*, *BRAX*, *Grzelczyk* and *Givane*.

The judgment in *Meeusen* prompted the Dutch government to amend the legislation on study grants in 2003. The explanatory memorandum on the bill included a summery of eight judgments of the Court of Justice on the rights to study grants of EU migrants and their children (TK 28865, no. 3).

The case law of the Court of Justice with respect to the Europe Agreements in *Barkoci & Malik* and *Jany* has influenced a series of judgments of Dutch courts and resulted in two new references by Dutch courts to the Court of Justice, see chapter VII below. The Jany judgment also resulted in a change in the Aliens Circular, specifying that CEEC citizens with residence rights under Europe Agreements can only be expelled on limited public order grounds, see the chapter on Enlargement.

Deleting the nationality requirement in order to allow EEA citizens to work as captains of Dutch ships was directly related to the case law of the ECJ (see Chapter II).

The comments and annotations on relevant ECJ judgments are reported in the literature section of the different chapters of this report.

Chapter VI
Policies of a General Nature with Possible Repercussions on the Free Movement of Union Citizens

Three general trends during the years 2002 and 2003 may have effects for the position of EU/EEA nationals in the Netherlands: (1) the centralization of the administration of the Aliens Act, (2) increased action against illegal immigration, and (3) the governments' new integration policy.

Firstly, in 2002 it has been decided to transfer most of the tasks of the local aliens police in handling applications for residence permits to the Immigration and Naturalization Service (IND) of the Ministry of Justice. In practice the result will be that applications from EU citizens for an EC residence card or a Dutch permanent or temporary residence permit will be handled by one of the four regional offices of the IND. This change is said to increase the quality of the administration, but it might well result, both for EU citizens and third country nationals, in longer delays in the issuing of the documents, less personal contact between the applicant and the administration, reduced access to the officers dealing with the case, and more complaints and procedures. The tasks of the local aliens police will be reduced to supervision of aliens in order to better control and prevent illegal immigration.

Secondly, more strict enforcement of rules and policies against illegal immigrants have been announced and new strict rules introduced, e.g. the extension of the obligation to carry or present ID-cards (see chapter II) and new rules on detention with a view to expulsion (increase of detention capacity and reduction of judicial review of detention). After the recent case-law of the Court it is not easy for an EU citizen to become an illegal immigrant. If an Union citizen loses his status on one ground, he acquires in most cases automatically a residence right on another basis in Community law. In practice, however, some EU citizen will be more often the subject of the increased controls than others. It is no coincidence that the 2003 reference by the District Court of The Hague to the Court of Justice on the detention of an EU citizen with a view to deportation concerned a French national of North African origin (caseC-215/03, mentioned in Chapter I under C).

Thirdly, the new integration policy, initiated in 2002 by the coalition government including the Pim Fortuyn Party (LPF) that was continued by the present government without the LPF, apparently aims at using integration tests as a means of selection of immigrants, reducing the number of family members to be admitted and making it more difficult for lawfully resident immigrants to acquire a secure residence status or Dutch nationality. Basically, the policy aims at introducing integration and language test before admission to the Netherlands (for family reunification), as a new condition for a permanent residence permit and, again, at naturalization. Each time the level of knowledge required is higher. Generally, the public funds for language and integration courses will be gradually withdrawn. The organization of the courses will be left to private institutions and the market. At present those courses are organized and funded by municipal authorities and offered by regional educational establishments. Immigrants will have to pay the market price. Part of that price may in some cases be refunded by the government upon successful completion of the course. Finally, the integration of immigrants settled in the Netherlands before the introduction of this new system will be checked.

Those so-called oldcomers (*oudkomers*) will be required to pass integration test. Failure will be sanctioned by reduction of social security benefits or an administrative fine for persons not relying on social security. The most extensive description of this new policy has been given in the White-book Revision of the integration system (*Contourennota Herziening van het inburgeringsstelsel*) presented to Parliament in April 2004 (TK 29543, nos. 1 and 2).

Generally, EU/EEA citizens and their family members, and citizens of some other rich countries(USA, Australia, Canada, New Zealand and Japan) are or will be excluded from the present and the proposed measures of this new Dutch integration policy. Because of the far-reaching and highly symbolic character of the new policy that mainly focuses at immigrants from Turkey and Morocco (read: Moslems), who are supposed to be difficult to integrate in Dutch society, the repeated explicit exemption of EU citizens may increase the general idea that EU citizens no longer are "aliens". However, the obligatory integration test for oldcomers may also be required from former EU citizens who moved to the Netherlands and acquired Dutch nationality, but only if they were born outside the EU. This is relevant, considering the (unexpected high) numbers of Dutch nationals also having the nationality of another Member States, see chapter VIII. Moreover, the White-book announces a study into the possibility of bringing migrants from other EU Member States, who were born outside the EU, also under the statutory integration obligation for oldcomers (TK 29543, p. 23). In our view these plans are highly questionable considering the obligation under Community law not to discriminate on the basis of nationality or ethnic origin. Migrants from other EU countries, with or without Dutch nationality, who were born outside the EU, will far more often have an non-European origin than the large majority of Dutch nationals. The relationship between being born outside the EU and the level of integration in the Netherlands decades later, appears to be far-fetched and not self-evident

Whether the positive effects of the trend that EU nationals, generally, are no longer considered and treated as "real aliens" but more as quasi-citizens will outweigh the negative effects of the increased tendency to treat all persons, born outside the EU as foreigners, is hard to predict. However, it is sure that the negative effects will be unevenly distributed among EU citizens in the Netherlands: for EU citizens of non-European origin or from the Southern Member States, the chances of experiencing the negative effects will be greater than for those born in the Northern Member States, who look "European".

Other relevant literature

W. Asbeek Brusse a.o., *Immigratie en asiel in Europa, Een lange weg naar gemeenschappelijkheid*? Utrecht, Lemma 2004.

R. Benevento, Integratie en immigratie gekoppeld, *Migrantenrecht* 2002, p. 20-22.

P. Boeles, Integratie als verplichte bruidschat, *Migrantenrecht* 2002, p. 17-20.

E. Brouwer, P. Catz and E. Guild, *Immigration, Asylum and Terrorism*, Nijmegen, Centrum voor Migratierecht 2003.

S. Goudsmit, Kroniek vreemdelingenrecht: Kabinet Balkenende: Minder rechtsbescherming voor migranten, *Nemesis* 2002, no. 6.

A. Ode and M. Brink, Verscheidenheid in integratie, *Migrantenrecht* 2002, p. 154-158.

T. de Lange a.o., *Arbeidsimmigratie naar Nederland, Regulering en demografische en economische aspecten in internationaal vergelijk*, The Hague 2003.

J.W. de Zwaan and A.J. Bultena, *Ruimte van vrijheid, veiligheid en rechtvaardigheid, De samenwerking op het gebied van Justitie en Binnenlandse Zaken in de Europese Unie*, The Hague, Sdu Uitgevers 2003.

Coalition agreements of cabinet Balkenende I (TK 28375, no. 5) and Balkenende II (TK 28637, no. 19).

Chapter VII
EU Enlargement

a) Texts in force

As a result of the Jany judgment of the Court of Justice the paragraph in the Aliens Circular on CEEC citizens has been amended stating that in case those citizens have residence rights under the Europe Agreements, those right can be ended on public order grounds only in the narrow range of cases (the Bouchereau-criteria) that apply for EU citizens having residence rights under the EC Treaty, TBV 2003/58 of 9 December 2003, amending B11/6.4 of the Aliens Circular, see Annex 12).

Generally, there has been considerable debate in the courts and in legal literature on the rights of third country nationals on the basis of the Europe Agreements with States in Central and Eastern Europe and the Association Agreement with Turkey. Hereunder, the case-law on the Europe Agreements has been summarized.

b) Draft legislation

Early 2001 the "Purple" Dutch government (PvdA, VVD and D66) in a letter to the Parliament stated its official policy to open the Dutch labour market for workers from the new Member States after accession. Only in case of serious disturbances of the labour market would the labour permit obligation be reintroduced for those workers (TK 20400 XV no. 59). This policy was confirmed a year later in the governments' White Book Integration in the perspective of immigration (TK 28198, no. 2, p. 11). In March 2002 the government announced the preparation of a bill granting priority in access to the labour market for worker from the new Member States (TK 28026, no. 3, p. 1). In October 2003 after the government had changed twice, the centre-right government Balkenende-II (CDA, VVD and D66) repeated the same policy line (TK 28972, no. 5, p. 33/34). However, later that Autumn the political opposition against this policy increased. This resulted in several parliamentary questions on the issue (Aanh. TK 2003-2004, nos. 393 and 294). The opponents made public statements about the risk of massive immigration of Polish workers and about the presumed intention of the German and Austrian governments to block access to the labour market for workers from the new Member States during the full seven years of the transitional period. As a first defensive measure the government in November 2003 asked the Central Planning Office (*Centraal Planbureau*) to make a review of the research on migration from the new Member States and a new forecast of the expected migration from those countries to the Netherlands (Press notice of the Ministry of Social Affairs of 28 November 2003). Early in 2004 the report of the Official Planning Office was published. It estimated that not more than 20,000 workers from Poland and the other new Member States would come to the Netherlands annually. The government announced that it would introduce a quotum of 20,000 labour permits to be issued without labour market test during the first year. This did not stop the political opposition. Christian-democrat and conservative MP's asked for more strict rules during the transitional period (TK 29407, no. 8). In April 2004 the government agreed to follow the majority in the Second Chamber that had asked to prevent labour migration from Poland. The obligation to have a labour permit remained in place during the first year of the transitional period. The only small liberalization was an exemption from the labour market test for jobs in five small sectors where there was

a clearly unmet demand for immigrant workers (TK 29407, nos. 9 and 10). However, two weeks before the accession date, the same Christian-democrat MP who had campaigned for a restrictive policy, in reaction to request of the national farmers organization, asked the government to introduce an exemption from the labour market test for workers from the new Member States employed in seasonal and harvesting jobs.

c) Jurisprudence

There has been a series of cases in Dutch courts following the ECJ's judgment in *Jany* and *Barkoci & Malik* on the right to establishment in the Europe Agreements. Most of these cases concerned CEEC nationals working as prostitutes. In most cases it was disputed whether self-established persons could be required to apply for a long term residence visa in their home country and await the decision that could last for many months or even a year, whether the documentation required by the Dutch authorities was reasonable, whether the person was really self-established or employed by another person, or whether self-employed prostitutes from the CEEC states were granted the same treatment as Dutch prostitutes. The outcome of these cases varied considerably between the different Aliens Chambers of the District Court of The Hague, see *Jurisprudentie Vreemdelingenrecht* 2002, nos. 277 and 417, 2003, nos. S31 and 345 and *Migrantenrecht* 2003, nos. 31 and 60.These cases, finally, resulted in two references by Dutch courts to the Court of Justice: a reference by the Assen Aliens Chamber of The Hague District Court of 16 September 2002, *Jurisprudentie Vreemdelingenrecht* 2002, 417 in the case *Panayotova a.o.* (case C-327/02) and a reference by the Judicial Division of the State Council of 4 February 2003, *Jurisprudentie Vreemdelingenrecht* 2003, 132 with annotation by C.A. Groenendijk in case C-58/03, *Encheva*. A month earlier the Judicial Division still had flatly denied that a Romanian citizen could claim a residence right directly from the Europe Agreement with Romania. A residence permit could be requested and issued once the provisions of national immigration law had been complied with, judgment of 13 January 2003, *Jurisprudentie Vreemdelingenrecht* 2003, 131 with annotation by C.A. Groenendijk

After these references the District Court of The Hague in practice has suspended dealing with similar cases and after 1 May 2004 the Immigration and Nationality Service has shown no interest in further judicial decisions in the cases where the appeal has been lodged by a citizen of one of the new Member States.

Only two other judgments of national courts are mentioned below, because they remain relevant for the nationals of Bulgaria and Romania in the period before accession of those two countries. The Assen Aliens Chamber of The Hague District Court held that the simple failure of a Romanian citizen who intended to work as a self-employed person, to register with the local aliens police was not sufficient ground for detention of that person with a view to deportation, judgment of 12 July 2002, *Jurisprudentie Bulletin* 2002, no. 16, p. 34). The Haarlem Aliens Chamber of The Hague District Court decided that, in case of the actual working of a business it appears that the partners in a firm do not incur any real financial risk related to the running of the firm's business, these partners cannot by considered as self-established persons having residence rights under the relevant provisions of a Europe Agreement, judgment of 12 February 2003, *Jurisprudentie Vreemdelingenrecht* 2003, 342.

d) Miscellaneous

The appalling housing conditions of seasonal workers from CEEC countries employed in harvesting has been the subject of repeated questions in Parliament. The government repeatedly promised that the Inspection Service of the Ministry of Social Affairs was active in detecting and preventing substandard housing for seasonal workers, e.g. Aanh. TK 2003-2004, no. 520 and TK 27223, no. 43.

During an official visit in Poland the former Dutch Prime-Minister Kok made public statement on the need for Polish nurses in Dutch hospitals. This issue has been the subject of much political debate (e.g. Aanh. TK 2001-2002, no, 871 and Hand. TK 26 March 2002, p. 4066-1069). It attracted a lot of attention in the media and considerable public funds were spend on recruitment and training of Polish nurses. A large group of nurses were enrolled in Dutch language training in Poland. In the end only approximately 100 nurses were employed in the Netherlands, recognition of the professional qualification caused serious problems. When the economic climate changed and the demand for nurses diminished in 2003, most of the Polish nurses returned to Poland. The whole project appears to have created a lot of disillusions in both countries, see the article of C. Pool mentioned below.

e) Literature

A. Böcker, *The establishment provisions of the Europe Agreements: implementation and mobilisation in Germany and the Netherlands*, ZERP-Diskussionpapier 2002/1, Bremen 2002.

A. Böcker and E. Guild, *Implementation of the Europe Agreements in France, Germany, the Netherlands and the UK: Movement of Persons*, London, Platinum 2002.

Centraal Planbureau, *Arbeidsmigratie uit de Midden- en Oost-Europese toetredingslanden*, Den Haag 14 January 2004.

E. Gerritsma, Uitbreiding en toegang tot de arbeidsmarkt, *Migrantenrecht* 2003, p. 353.

R.H. van Ooik and H. Staples, Het rechtstreekse beroep van Oost-Europese zelfstandigen op de Europa Akkoorden, *Nederlands Tijdschrift voor Europees Recht* 2001, p. 313-320.

R.H. van Ooik, Een activiteit waarbij onder bezwarende titel een dienst wordt verricht ten behoeve van de ontvanger, zonder dat matieriële goederen worden geproduceerd of overgedragen, Over de Jany-uitspraak en prostitutie als economische activiteit, *Nederlands Tijdschrift voor Europees Recht* 2002, p. 1-7.

C. Pool, Hedendaagse migratie van Polen naar Nederland, *Justitiële Verkenningen* 2003, p. 63-80.

H. Staples, Gelijke behandeling voor onderdanen van de Midden- en Oost-Europese landen die in een lidstaat arbeid in loondienst verrichten (extensive case-note on the *Pokrzeptowicz* judgment), *Nederlands Tijdschrift voor Europees Recht* 2002, p. 81-85.

Chapter VIII
Statistics

Immigration from and emigration to other Member States
The total registered immigration to the Netherlands of persons born in one of the 14 other Member States in 2003 amounted to 18,300 persons. The registered emigration of persons born in other Member States in 2003 was 16,120. Among those numbers are also some Dutch nationals, born in one of the other Member States. However these data give a fair picture of the movement to and from the Netherlands within the EU. The main countries of origin and destination are Germany, the UK, Belgium, France, Spain, Portugal and Italy.

Table 1. Migration to and from the other 14 Member States in 2003

	Immigration	Emigration	Surplus	Adm. corr.
Germany	4,750	4,117	633	-1,100
United Kingdom	3.805	3,763	41	-1,585
Belgium	1,930	1,484	446	-265
France	1,669	1,536	133	-543
Spain	1.283	1,269	14	-356
Portugal	1.193	669	524	-391
Italy	1,170	1,138	32	-420
Other MS	2,499	2,146	353	-807
Total 14 MS	18,299	16,123	+2,176	-5,467

The last column represents the total number of persons that has been registered by the municipal population registers as having left the Netherlands without reporting their emigration to the municipal authorities. These so-called administrative corrections in 2003 made up about one third of the total number of EU citizens registered as having permanently left the Netherlands.

Resident EU citizens
On January 1, 2003 the total number of EU citizens from the other 14 Member States registered as residents in the Netherlands was little over 210,000. The size of the group has been slowly but steadily increasing since 1997.

Table 2. Total number of resident nationals of 14 Member States

1996	191,100
1997	188,300
1998	190,200
1999	192,200
2000	195,900
2001	201,600
2002	207,900
2003	210,600

The largest groups of EU-citizens registered as residents in January 2003 were citizens of the following Member States.

Table 3. Registered residents of certain Member States (2002 and 2003)

	2002	2003
UK	43,500	44,000
Germany	55,000	56,000
Belgium	26,000	26,500
Italy	18,000	19,000
Spain	17,500	17,500
Portugal	10,500	n.a
Greece	6,015	n.a.

From these figures it appears that the growth between 2002 and 2003 is more or less evenly distributed over the major Member States of origin and not due to increased immigration from one or two Member States only.

The total number of EC residence cards issued to EU nationals under Directive 68/360 on 2 January 2003 was 110,562.

Naturalisation and dual nationality

Persons who have both Dutch nationality and the nationality of another Member States, are not included in table 2 and table 3. In the official statistics these dual nationals are counted as Dutch nationals. On 1 January 2003 the total number of residents in the Netherlands having both Dutch nationality and one or more other nationalities was 881,000 (in 1995: 394,000). The number of Dutch residents, also having the nationality of another Member States, is published for some Member States

Table 4. Dutch nationals *having the nationality of another Member State in 1986 and 2003*

	1986	2003
Belgium	26,300	28,900
France	11,800	14,300
Germany	37,700	44,200
Great-Britain	38,300	41,900
Italy	14,059	17,500
Poland	10,700	15,000

(Source: CBS, Statline 2004)

From these figures it is clear that the number of persons with multiple nationality has increased considerably over the last years and that the total number of residents of the Netherlands originating from other Member States is far greater than the number of EU citizens mentioned earlier in this paragraph. If one compares the figures of the tables 3 and 4, it appears that the total number of nationals Belgium, Germany, Great-Britain and Italy resident in the Netherlands, is two times the number mentioned in table 3.

Half of the nationals of those four Member States, residing in the Netherlands, also have Dutch nationality and, thus, are counted only as Dutch nationals in the official Dutch statistics. This may imply that the size of the migration between the Member States is considerably larger than is usually concluded on the basis of the official population statistics of the Member States. It also implies that a considerable number of EU citizens living in the country of their nationality are actually migrants, who used their freedom of movement within the EU or are descendants of those migrants, and, thus have certain rights under Community law on free movement, e.g. the right to family reunification. Finally, it implies that the policy of reverse discrimination, practised by certain Member States including the Netherlands, deserves critical consideration by the Commission, since this policy may well result in discrimination against EU migrants who also have the nationality of their Member State of residence.

Table 5. Number of naturalisations and naturalisation propensity of EEA nationals in 2001

nationality	total number resident in NL	number of naturalisations	percentage naturalized
Swedish	3,077	8	0.3
Danish	2,588	9	0.3
Irish	3,990	16	0.4
Finnish	1,980	8	0.4
Norwegian	2,016	9	0.4
Spanish	17,155	98	0.6
Belgian	25,860	189	0.7
British	41,404	356	0.9
French	13,326	123	0.9
German	54,811	573	1.0
Austrian	3,366	38	1.1
Italian	18,248	211	1.2
Portuguese	9,765	129	1.3
Greek	5,692	26	2.2
Total EEA	203,278	1,893	0.9

(Source: CBS)

Generally, the propensity of resident EEA citizens to apply for Dutch nationality is relatively low. In 2001 almost 7% of all non-Dutch residents, but only 0.9% of the resident EEA nationals were naturalized. Most of the EEA nationals, who apply for naturalisation, do so after much longer residence in the Netherlands (ten years or more) than the residents of third countries. From the above table it appears that, generally, nationals of the Southern Member States have a higher inclination to apply for naturalization than nationals from the Northern Member States.

Persons born elsewhere in the EU

The total number of residents in the Netherlands, born in one of the 14 other EU Member States, irrespective of their nationality, is considerably higher: 749,000. Over half of these persons were born in Germany (CBS, *Maandstatistiek Bevolking* 2002, no. 9, p.

31). This figure supports the above finding that the total mobility within the EU is severely underestimated, when only the number of resident non-nationals is taken into account.
The number of residents born in the other Member States in 2002 was almost the same as in 1996: 732,000. However, between 1996 and 2002 the number of residents in the Netherlands born in the four largest new Member States increased considerably.

Table 6. Number of residents in the Netherlands born in four new Member States

	1996	2002	(indexed growth 1996=100)
Poland	25,125	32,210	128
Hungary	11,454	12,359	108
Czech Rep & Slovakia	7,106	9,456	133
(former Soviet Union	13,485	34,903	259)

(Source: Centraal Bureau voor de Statistiek, Statline 2003)

Labour migration from new Member States
Considering the number of labour permits granted to citizens of the four larger new Member States (then candidate Member States) in the years 1996-2002, the lawful employment by citizens of those state in the Netherlands has increased considerably over the years before their accession to the EU.

Table 7. Number of labour permits granted to citizens of four CEEC states (1996-2002)

	Poland	Hungary	Czech Rep	Slovakia
1996	735	275	127	47
1997	928	349	181	75
1998	1,184	502	157	125
1999	1,501	662	405	201
2000	2,497	718	625	433
2001	2,831	1,063	992	681
2002	5,633	725	665	415

(Source: Sopemi 2002 and CWI)

Surprisingly, the number of permits granted to Polish workers doubled from 2001 to 2002, whilst the number of permits granted to workers from the other three countries decreased slightly. In 2002 more than 20% of all permits issued were issued to labour migrants from Poland. Since almost 40% of all labour permits issued in that year were granted for jobs in agriculture, probably most of the permits granted to Polish workers related to seasonal jobs in harvesting or fruit picking. The large increase of permits issued to Polish workers in 2002 might indicate that seasonal work that was performed without permit in earlier years has been regularized in 2002.

Cross-border employment

The following data indicate the size of the cross-border employment between Belgium and the Netherlands.

Table 8. Employment across Belgian-Dutch border (1999-2003)

	From Belgium to NL	From NL to Belgium
1999	16,145	6,155
2000	16,740	6,200
2001	17,505	6,170
2002	18,870	6,110
2003	19,780	5,755

(Source: Centraal Bureau voor de Statistiek, Statline 2003)

From these data it is clear that the cross-border employment from Belgium to the Netherlands by far outnumbers the cross-border employment in the opposite direction. The number of Dutch citizens performing cross-border employment in Belgium is stable or slightly decreasing, whilst the number of Belgian citizens working across the border in the Netherlands gradually increased over the last five years.

Chapter IX
Social Security

a) Text in force

In the years 2002 and 2003 there is hardly any relevant legislation concerning social security in the context of this report.

The advice of the Board of Health Care Insurances (*College voor zorgverzekeringen*) to health care insurances companies, mentioned in our 2000-2001 report to accept the registration of Community citizens for a health care insurance on the basis of a passport or European identity card and not an EU/EAA-document, provided by the Aliens Police, has been extended to Swiss citizens as well (Circular Cvz 4 December 2002, no. 02/49)

The approval of the extension of Regulation 1408/71 for third country nationals (Regulation 859/2003) by the Dutch parliament can be found in TK 2002 –2003, 23490, nr. 8l/261.

The Social Insurance Bank, which is responsible for the implementation of the national insurances (child benefits, old-age pensions and survivors' benefits) emphasizes in its Policy Rules of 2003 (p. 246, see www.svb.nl) that the Bank concludes from the case law of the ECJ in *Grzelczyk*, *Gottardo* and *D'Hoop* that in the application of the Dutch social security legislation every distinction by nationality between Dutch citizens and EU-citizens has to be omitted. An appeal on equal treatment can be done irrespective of the place of residence of the EU-citizen.

b) Draft legislation

In Parliament a Bill is pending regarding the approval of two new bilateral Social Security Treaties between The Netherlands and Morocco and between The Netherlands and Tunisia (TK 29005). The discussion in Parliament raises some questions regarding the conformity with Community law. In these new Treaties there is a provision that gives the Dutch authorities the competence to suspend, refuse or withdraw Dutch disability-, survivor- or old age pensions of beneficiaries living in Morocco or Tunisia when the authorities or social security agencies in those countries do not supply requested information (by the Dutch authorities) within three months. This provision creates the opportunity to suspend, refuse and withdraw a benefit in a situation which can not be influenced by the beneficiary himself. The Council of State stated in its opinion that this provision is a violation of the non-discrimination clauses of Articles 65(1) Euro-Mediterranean Association Agreement EC-Morocco and Tunisia. The concluding of a bilateral agreement that deviates from these Association Agreements is not in line with Article 300(7) EC Treaty, according to the Council of State.
The provision is also a violation of Article 65(4) of the same Association Agreements, which prohibits the restriction of export of the benefits in question and which has direct effect.

c) Judicial practice

- A Portuguese national living in The Netherlands was refused the entitlement to a child benefit allowance for two children living in Portugal because he did not fulfil the condi-

tion of providing the required proof that he supported these children in a substantial way. The Central Appeals Tribunal confirms that this refusal is legitimate and not in breach with Article 78 of Regulation 1408/71, which allows the requirement of a condition of support. According to the Central Appeals Tribunal it is standard case law of the ECJ that Member States are exclusively competent to draw up conditions for the entitlement of benefits. There is no question of forbidden residence requirement, nor is there a hinder of the right on free movement of persons within the EU (Central Appeals Tribunal 24 December 2002, 00/3714 AKW, LJN: AF3446, unpublished)

- A Spanish sailor had worked from 1969 to 1992 for various Dutch employers on board of Dutch vessels. After that he returned to Spain where until 1994 he received an allowance form his last Dutch employer in the context of a release arrangement. From 1994 he receives a Spanish benefit. From the moment the sailor returned to Spain (1992) the Dutch Social Insurance Bank stops the Child benefit allowances, because they argued that according to Article 13 (2)(f) Regulation 1408/71 the Dutch legislation on national insurances was no longer applicable to him. This article formulates a special rule for applicable legislation for post active workers, The Central Appeals Tribunal confirms the decision of the Social Insurance Bank, referring to the judgment of the ECJ in the Kuusijärvi case (Central Appeals Tribunal 24 April 2002, 00/741 AKW, *Sociaal Maandblad Arbeid* 2002, p. 580).

- An Italian national had lived – with interruptions – for 36 years in The Netherlands and had worked as a self-employed person for many years. In 2002 he has ended his self-employed activities and receives a Social Assistance benefit from 6 March 2002. His EU-document expired on 15 April 2002 and a request for renewal was only filed on 31 May 2002. The Social Assistance benefit was stopped after two or three months from 15 April 2002, because from that moment the Italian was no longer residing lawfully in The Netherlands as a Community citizen, based on Article 8(e) Aliens Act 2000. The District Court rejects the arguments of the Italian claimant that he has a right of residence, based on Directive 68/360/EC. According to the Court Article 7 of this Directive does not have to be applied for self employed persons in the same way as for employees who end their economic activities. An appeal to Article 18 EC Treaty and the judgment of the ECJ in *Baumbast* is also rejected by the Court. There is no question of disproportional violation of the exercise of the right of residence based on Article 18 (1) EC Treaty by denying lawful stay from 15 April 2002. The Court takes into account that the Italian from 1 October 2002 is working as a parttime employee and would have received additional social assistance from that moment if necessary. (District Court Utrecht 6 August 2003, *Migrantenrecht* 2003, 66)

- A Turkish national, who had worked in The Netherlands from 1966, retired in 1997 and received an Old Age Pension benefit. He also received a supplement for his wife who was younger than 65 years and who lived not in The Netherlands but in Turkey. This supplement was reduced, because his wife did not fulfil the condition of living in The Netherlands necessary for the entitlement to so called 'transitional arrangements', covering the period between the 15th birthday of the woman and the year 1957 when the Old Age Pension was introduced.

According to the Central Appeals Tribunal this reduction is not in breach with the equal treatment clause of Article 3 of Decision 3/80 nor any other supranational or international provision. The Tribunal takes into account the case law of the ECJ with re-

gard to Article 10 Regulation 1408/71 (without specifying this any further) and the character of the building up system (*opbouwstelsel*) of the Old Age Pension scheme (Central Appeals Tribunal 28 March 2003, 00/4037 AOW, LJN: AF7507)

- A British citizen who lawfully stayed in The Netherlands for more than ten years, was refused a Social Assistance benefit on 1 July 2002 by the municipality of Amsterdam. This refusal was based on the fact that the Brit was registered in the municipal basic administration (GBA) under code 28, which meant that the Brit was a Community citizen, who stayed lawfully based on Article 8(e) Aliens Act 2000, being economically active and having free access to the labour market. The internal rules of the municipality of Amsterdam prescribed that these persons could only get additional social assistance, but no full social assistance benefit. According to the court these internal rules are not in line with EU regulation nor with the standard case law of the Central Appeals Tribunal. If the British claimant would have become disabled or not voluntary unemployed in 2002, which was not clear in this case, he would have kept his status as Community citizen based on Article 8(e) Aliens Act 2000 for a while as well as an entitlement to a full social assistance benefit (District Court Amsterdam 28 November 2002, AWB 02/4555 NABW, *Rechtshulp* 2003, issue 6/7, p. 54-57, with annotation by T.L. Tan)

d) Miscellaneous

In our 2000-2001 report we mentioned the coming into force of the Act Restricting Export of Benefits, which stipulated that the export of social security benefits will only be possible to countries, with which a social security treaty is concluded that guarantees sufficient control on the compliance.

This Act has hardly any impact on the export possibilities of Dutch social security benefits for EU/EEA citizens within the EU/EEA. Only with regard to 'non-contributive benefits' it is possible to limit the access of EU/EEA-citizens, who settle outside (Dutch) national territory, if this benefit is listed on Appendix IIbis of Regulation 1408/71. So far, this is only the case with the allowance for youth-handicapped persons (*Wet Arbeidsongeschiktheidsvoorziening jonggehandicapten (WAJONG)*).

In order to realize the export restriction of the Dutch Supplementary Benefits Act (*Toeslagenwet*), the Government has been trying to inscribe the Supplementary Benefits Act on this Appendix IIbis of Regulation 1408/71 as well. In the context of the simplification and modernisation of 1408/71 the Dutch government claims that the Supplementary Benefits Act will be inscribed on the new Appendix X of Regulation 883/2004, which would allow The Netherlands not to export this benefit any more.

The Central Appeals Tribunal has decided that the export restriction of this Supplementary Benefit for Turkish persons is not in line with Article 5 of ILO Convention 118 (Central Appeals Tribunal 14 March 2003, *Rechtspraak Vreemdelingenrecht 2003*, no. 82, with annotation by P.E. Minderhoud). Meanwhile, the Dutch government has started a formal procedure to denounce ILO Convention 118 (TK 29832).

The Central Appeals Tribunal has also decided that the export restriction of this Supplementary benefit for Moroccan persons is not in line with the bilateral Social Security Treaty between Morocco and The Netherlands (Central Appeals Tribunal 12 September 2003, *Rechtspraak Vreemdelingenrecht 2003*, no. 84, with annotation by P.E. Minderhoud).

e) Literature

A.P. van der Mei, De juridische meerwaarde van het burgerschap van de Europese Unie (1), *Migrantenrecht* 2003, p. 268-275.

A.P. van der Mei, De juridische meerwaarde van het burgerschap van de Europese Unie (2), *Migrantenrecht* 2003, p. 318-324.

P.E. Minderhoud, Ontwikkelingen inzake de Wet Beperking Export Uitkeringen, *Migrantenrecht* 2003, p. 307-317.

P.E. Minderhoud and C.A. Groenendijk, Annotation on EHRM 30 September 2003, (*Poirrez*), *Rechtspraak Vreemdelingenrecht 2003*, no. 81.

H. Oosterom Staples, Annotation on ECJ 11 July 2002, C-224/98 (*D'Hoop*), *Rechtspraak Vreemdelingenrecht 2002*, no. 92, p. 425-427.

F.J.L. Pennings, Bovenwettelijke aanvullingen op buitenlandse werkloosheidsuitkeringen – De invloed van de 'onbekende' verordening 1612/68, *Sociaal Maandblad Arbeid* 2002, p. 561-566.

I. van der Steen, Verdragen tussen lidstaten en derde staten: verbod van discriminatie (annotation on ECJ 15 January 2002, C-55/00 (*Gottardo*), *Nederlands Tijdschrift voor Europees Recht* 2002, p. 283-287.

I. van der Steen, Europese coördinatieregelingen inzake sociale zekerheid uitgebreid tot onderdanen van derde landen, *Nederlands Tijdschrift voor Europees Recht* 2003, p. 63-67.

G. Vonk, Migration, Social Security and the Law: Some European Dilemmas, *European Journal of Social Security* 2002, p. 315-332.

Chapter X
Establishment, Provision of Services, Students

a) Texts in force

In January 2001 a Bill on the implementation of Directive 98/5/EC on the establishment of advocates in another Member State than the one where they obtained their professional qualifications was introduced in Parliament. The Bill proposed to introduce several amendments in the Act on Advocates (*Advocatenwet*), TK 27587, nos 1-3,). The Bill contained a table specifying for each provision of the Directive how it will be implemented in the Act on Advocates, in regulations on the basis of that Act or in other Dutch legislation. After approval in both Houses of Parliament the Act entered into force on 4 September 2002 (Act of 13 July 2002, *Staatsblad* 440, see Annex 13). The infringement procedure started by the Commission (case C-149/02) resulted in a speeding of the procedure in Parliament (see letter of the Minister of Justice of 16 May 2002, TK 27587, no. 7).

As mentioned in our previous report the judgment of the Court in the *Meeusen* case and the Dutch case-law following *Meeusen* prompted the Minister of Education, Culture and Sciences to present a white paper entitled *Studeren zonder grenzen: Studiefinanciering: de basis voor studeren in het buitenland* (Study without frontiers, student grants as the basis for studying abroad). This white paper contained a summary of comparative study on the possibilities to study abroad on the basis of the national grants in the 15 EU Member States and Norway and the main results of a legal study on the effects of the ECJ case law for the entitlement of non-Dutch students to Dutch student grants. The report of the latter study identified three possible problem issues: (1) students living outside the Netherlands, (2) students following a course outside the Netherlands that is not among the restricted number of foreign courses recognizes by the relevant Dutch authorities as a course not being offered in the Netherlands, and (3) the requirement for the VISIE-scholarship that the applicant has followed officially recognized schooling during at least one year in the Netherlands (TK 24724, no. 48). The Minister commissioned prof. Mortelmans to write a report on the possibilities to export under Community law (see below). This report was presented to Parliament in June 2002 (TK 24724, no. 56, see Annex 14). In 2003 a Bill was introduced in Parliament in order to amend the two Acts on student grants (*Wet studiefinanciering and Wet tegemoetkoming onderwijsbijdrage en schoolkosten*). In both Acts the residence requirement has been deleted and in the second Act the employment requirement was deleted because of its incompatibility with EC law (TK 28865, no. 3). After parliamentary approval the Act was published (Act of 22 October 2003, *Staatsblad* 469, see Annex 15) and entered into force on 12 November 2003 (*Staatsblad* 2003, 470). The Explanatory Memorandum on this bill explicitly mentioned the pressure by the European Commission on the Dutch government for removal of the residence requirement. In the memorandum the government estimates that approximately 1,000 students will profit from this change and the total extra costs for the public funds will be around 4 million euros (TK 28865, no. 3, p. 2 and 7).

On 15 July 2003 the Act amending the Act on the individual health professions (*Wet beroepen individuele gezondheidszorg*) implementing Directive 2001/19/EC with regard to medical doctors, nurses and midwifes entered into force (Act of 22 May 2003

, *Staatsblad* 244, see Annex 16 and Royal Decree of 2 July 2003, *Staatsblad* 289, see Annex 17). Article 41 and Article 45 of the Act on the individual health professions are amended to allow for certification of the professional qualifications not only on the basis of certificates but also on the basis of practical experience and post-initial training. In a Royal Decree rules may be established concerning the knowledge and practice test and the fees for such tests. However, at the end of 2003 no such decree had been published.

The procedure on the recognition of diploma's and professional qualifications obtained outside the EEA has been the subject of repeated critical questions and the debate in Parliament, especially in relation with the barrier to employment it creates for refugees (letters from the Minister of Social Affairs to the Second Chamber of 9 April 2002 and 20 December 2002, TK 27223, nos. 21 and 35). In answer to parliamentary questions the Minister of Health stated that in 2000 out of total 257 applications for recognition 141 were certified as (almost) equal to Dutch diploma's and in 2001 142 out of 254 applications were recognized as (almost) equal, Aanh. TK 2001-2002, no. 1383).

b) Draft legislation

c) Miscellaneous

The issue of the right of children of unemployed cross border workers to study grants was the subject of questions both in the European and the Dutch Parliament (Aanh. TK 2002-2003, no. 310).

d) Literature

K.J.M. Mortelmans a.o., *De meeneembaarheid van Nederlandse studiefinanciering bezien vanuit het Europese recht*, Utrecht 2002.

K.J.M. Mortelmans and R,H, van Ooik, *Europees Recht en Nederlandse studiefinanciering*, Europese Monografieën no. 71, Deventer, Kluwer 2003.

H. Staples, Vrij verkeer van personen, Een zwaluw maakt nog geen zomer; is burgerschap van de Unie de juiste grondslag voor een recht op bestaansminimum voor studenten?, *Nederlands Tijdschrift voor Europees Recht* 2002, p. 8-13.

Chapter XI
Miscellaneous

a) Texts in force

The 2000 Act introducing major changes in the 1984 Law on the Netherlands nationality (Act of 21 December 2000, *Staatsblad* 2000, 618) finally entered into force on 1 April 2004.

The amended Act extends the categories of aliens who may acquire Dutch nationality through option. It also changes the option from a one sided declaration by the alien, into a declaration that has to be confirmed by the Minister of Justice. That confirmation can be refused on serious public order grounds (new Article 6). In fact the new option is a simplified naturalization procedure that exempts the alien from the language and integration test that is required in case of naturalization. The requirements for this test are raised considerably. Under the old Act is was sufficient if the applicant was able to have a simple conversation with the civil servant on the completion of his application form. Under the new Act the applicant not only has to speak and understand Dutch language, but also to read and to write the language and prove to have knowledge of the basic constitutional and social arrangements of the Netherlands (Article 8(1)(d) of the amended Act). Detailed rules on both elements of this test have been published in 2002 (Royal Decree 0f 15 April 2002, *Staatsblad* no. 197). The language test takes three hours. It can only be taken at seven educational centers. Whilst under the old act 90% of the naturalization applications were granted, under the new act only half of applicants that took the test in 2003, succeeded in passing both elements of the new test. The absolute numbers have diminished considerably. Whilst over the last years 40,000 to 60,000 persons were naturalized each year, in the second half of 2003 only 800 applicants succeeded for the full new naturalization test (Aanh. TK 2003-2004, no. 1406, see Annex 18).

Moreover, the residence requirement has been tightened: in stead of five year residence in the Netherlands and the possession of a residence permit at the moment of the application for naturalization, the applicant will have to prove five years uninterrupted lawful residence (Article 8(1)(c)). The current rule that an applicant for naturalization has to make an effort to get rid of his former nationality, if this can be reasonably required (Article 9(1)(b) of the Act) has not been changed.

The amended Act also provides that persons with dual nationality who after the age of eighteen have lived for an uninterrupted period of more that ten years outside the Netherlands in the country of their other nationality, will lose their Dutch nationality, unless they have applied for a Dutch passport within that period. However, this rule does not apply to persons residing in territories where the Treaty on the European Union is applicable. Under the new rule Dutch citizens who are also nationals of another EU member state, will not lose their Dutch nationality on the ground of prolonged residence in that member state; see Article 15(1)(c). In Article 15(3) of the Act it is provided that a residence of less than one year on the territory of the European Union does not count as an interruption of the ten year period.

b) Draft legislation

At the end of 2003 the Bill proposing to agree with the ratification of the 1995 Council of Europe Convention on the protection of National Minorities, which was introduced in Parliament in 1999, was still pending in the Senate (EK 26389, nr. 236). The main political parties are divided about which groups should be designated as national minorities for the purpose of the convention. The Government in 1999 proposed to included all main immigrant groups covered by the official policy on integration of ethnic minorities, whilst some parties wanted to limit the coverage to the Frisian minority only. In December 2003 the present Government informed Parliament that it has decided to follow the latter option (TK 26389, no. 8).

c) Teaching

Post-academic courses including elements of Community Free Movement Law have been offered in 2002 and 2003 both by the Institute for Immigration Law of the University of Leiden and by the Centre for Migration Law of the University of Nijmegen. At the latter university a regular course on European Migration Law is offered each year to students in their final year since 2001.

d) Literature

M.L.H. Gelauff, De gewijzigde Rijkswet op het Nederlanderschap in hoofdlijnen, *Migrantenrecht* 2003, p. 112-120.

C.A. Groenendijk, De toegenomen koppeling van de RWN aan de Vreemdelingenwet, *Migrantenrecht* 2003, p. 149-158.

G.R. de Groot, Internationale ontwikkelingen: de toenemende tolerantie van meervoudige nationaliteit, *Migrantenrecht* 2003, p. 121-124.

G.R. de Groot, *Handboek Nieuw Nationaliteitsrecht*, Deventer, Kluwer 2003.

G.R. de Groot, Europees Nationaliteitsverdrag in werking voor Nederland?, *Migrantenrecht* 2002, p. 4-13.

C.S. Poortman, Hoofdlijnen rechtspraak Rijkswet op het Nederlanderschap 1993-2002, *Migrantenrecht* 2003, p. 158-163.

H.A. Wolf, De vernieuwde naturalisatietoets, *Migrantenrecht* 2003, p. 124-126.